# Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd
# [2000] SGHC 3

**Case Number** : Suit 1944/1997

**Decision Date** : 06 January 2000

**Tribunal/Court** : High Court

**Coram** : S Rajendran J

**Counsel Name(s)** : Imran Khwaja and Sayana Baratham (Tan Rajah & Cheah) for the plaintiffs; Michael Hwang SC and Christine Chan (Allen & Gledhill) for the defendants

**Parties** : Cathay Theatres Pte Ltd — LKM Investment Holdings Pte Ltd

*Civil Procedure – Judgments and orders – Stay of execution pending appeal – Whether special circumstances exist to justify grant of stay – Plaintiffs seeking specific performance of contract – Impecunious defendants – Vendor having lien on property – Whether appeal nugatory if stay not granted*

:The plaintiffs are the lessees of a property known as `Regal Theatre` under a 99-year lease granted by the Housing & Development Board. The defendants own and manage residential properties in Singapore.

The defendants on 17 May 1996 entered into a contract with the plaintiffs for the purchase of Regal Theatre for the sum of $16.5m. Ten per cent of the purchase price was paid to the plaintiffs and the balance was payable on the completion of the transaction scheduled for 16 August 1996. Completion of the purchase did not, however, take place.

On 13 November 1997 the plaintiffs commenced proceedings against the defendants claiming, inter alia, specific performance of the sale and purchase agreement. The defendants counterclaimed for rescission of the agreement on grounds of misrepresentation and defects in the plaintiffs` title and for the refund of the 10% deposit.

The hearing of the action took place before the Honourable Lee Seiu Kin JC. On 29 June 1999 Lee Seiu Kin JC made the following declaration/orders:

(1) The plaintiffs` notice to complete dated 17 August 1996 with regard to the sale of the leasehold property known as Regal Theatre, 3501 Jalan Bukit Merah, Singapore (the `property`) is valid.

(2) The plaintiffs are not obliged to transfer the deposits (if any) paid to them pursuant to cl 2(iv) of each of the leases granted by the plaintiffs as landlord to Mcdonald`s Restaurants Pte Ltd (`Mcdonald`s`) for successive terms (the `leases`) as set out in the Schedule hereto until Mcdonald`s have agreed in writing to release them from all their obligations in respect thereof and that in the event that such agreement in writing is provided by Mcdonald`s, the obligations of the plaintiffs under cl 4(3) of the option relating to the property granted by the plaintiffs to the defendants on 17 April 1996 will be limited to transferring the cash deposit of $24,000 held in respect of the current lease.

(3) The plaintiffs are entitled to a lien on the property in respect of the sum due and owing by the defendants to the plaintiffs under the orders made in paras (4) and (5) below until payment and for the plaintiffs` costs of this action.

(4) The defendants specifically performed the contract for sale of the property within 14 days from the date of judgment and pay to the plaintiffs the sum of $14,850,000 being the balance of the

purchase price.

(5) The defendants pay the plaintiffs late completion interest under condition 8(a) of the Law Society`s Conditions of Sale 1994 on the balance of the purchase price at 10% per annum amounting to $4,068.49 per day from 17 August 1996 to the date of actual completion less the rent received in respect of the property by the plaintiffs as landlord from 17 August 1996 to the date of actual completion.

(6) In the event of default being made by the defendants in making the payment due to the plaintiffs, the plaintiffs be at liberty to apply to enforce the lien referred to in para (3) above; and

(7) The defendants pay the plaintiffs their costs in this action.

The defendants filed notice of appeal. [The appeal was subsequently withdrawn - Ed.]

On 17 August 1999 the plaintiffs served a statutory demand under the Companies Act demanding payment of $3,419,514.72 being late completion interest as at that date. On 20 August 1999 the defendants took out this application for a stay of proceedings pending appeal. As the plaintiffs were about to present a winding-up petition against them on the grounds that the defendants had failed to meet the statutory demand, the defendants, on 15 September 1999, applied for an injunction restraining the plaintiffs from so doing. The court granted the injunction pending the hearing of this stay application. The application for the stay came up for hearing before me on 21 September 1999. I granted the application but directed that the plaintiffs be at liberty to enforce that part of the judgment that related to the plaintiffs` lien. The plaintiffs have appealed against my decision. I now give my reasons. [The appeal was subsequently withdrawn - Ed.]

The order obtained by the plaintiffs was an order for specific performance. Such an order can, with relative ease, be enforced against the vendor of a property but enforcement against a purchaser can be difficult and, at times, impossible. On the facts of this case it was not in dispute that the defendants were impecunious. The defendants were unable to pay even the completion interest let alone the balance of the purchase price. To require the defendants to complete the purchase when the defendants did not have the funds and could not raise the funds for the purchase would be an exercise in futility.

Mr Michael Hwang, who appeared for the defendants also raised other considerations. Even if completion could in some way be effected, complications will set in in the event the appeal is successful: stamp duty - for instance - has to be paid on completion. Stamp duty will again have to be paid for the conveyance back in the event the appeal is successful. Who will bear these costs? What about the costs of repairs and maintenance of the theatre? What about property tax and insurance premiums? What would be the position of any contracts or variation of contracts agreed to between the defendants and tenants in the building? What if there is a fire or the property is acquired? And the list of such questions can go on.

At the hearing before Lee Seiu Kin JC, the defendants had submitted that it would be inappropriate to make an order for specific performance against a purchaser to compel the purchase of the property. In support the defendants had relied on paras 8.100 to 8.200 of ***Sharpe: Injunctions and Specific Performance*** (1992 Ed), where the learned author had argued that specific performance should not be ordered in such cases. Lee Seiu Kin JC was impressed by the arguments marshalled by Sharpe and stated in his judgment that a compelling case for not granting specific performance in the case of a vendor had been made out by Sharpe. However, in the light of other authorities, Lee Seiu Kin JC felt that he would have to be content to merely state that the views expressed by Sharpe had merit and

leave it to another forum to decide whether it was appropriate to retain the remedy of specific performance for vendors. Accordingly, Lee Seiu Kin JC upheld the plaintiffs` submission that specific performance should be ordered in this case.

Although he granted the order for specific performance, Lee Seiu Kin JC, perhaps in recognition of the difficulties that can be attendant in seeking to compel a purchaser of property to complete the purchase, specifically declared that the plaintiffs were entitled to a lien on the property for the outstanding amount (including completion interest) and ordered that in the event the defendants defaulted in completing the plaintiffs be at liberty to apply to enforce the said lien.

As the defendants neither desired to purchase the property nor had the funds with which to do so, they could have no objection to the plaintiffs exercising their rights under the lien to sell the property to a third party. Mr Hwang, upon being asked, confirmed that that was the defendants` position and confirmed that the stay order, if granted, need not encompass the plaintiffs` rights under the lien.

Mr Imran Khwaja, who appeared for the plaintiffs, submitted that the plaintiffs, as the successful litigants, were entitled to the fruits of their judgment and stay should not be granted unless it be shown that the financial position of the plaintiffs was such that, in the event the appeal was successful there would be a risk of the defendants not getting their moneys back. In support of his submission Mr Khwaja relied on the following passage in the judgment of Yong Pung How J (as he then was) in the case of **Lee Kuan Yew v Jeyaretnam JB** [1990] SLR 740 [1991] 1 MLJ 83 :

> *In such cases in which an unsuccessful defendant has had a full opportunity to present his case, the court should not deprive a successful plaintiff of the fruits of his victory pending an appeal, unless the unsuccessful defendant can show some special circumstances to justify the granting of a stay:* ***Hong Leong Finance Bhd v Hon Hoi Weng & Ors****. An example of such special circumstances would be a situation in which it can be shown by affidavit that, unless a stay is granted, a successful appeal could be nugatory. There might be the likelihood of the judgment creditor becoming insolvent before the disposal of the appeal, or the circumstances might be such that, if the judgment debt and costs are paid, there is no reasonable probability of getting them back if the appeal succeeds.*

Mr Khwaja also referred to **Lee Sian Hee v Oh Kheng Soon** [1992] 1 SLR 77 at 78 where the Court of Appeal stated:

> *While the court has power to grant a stay, and this is entirely in the discretion of the court, the discretion must be exercised in accordance with well established principles (* ***Lee Kuan Yew v JB Jeyaretnam****). First, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which prima facie he is entitled, pending an appeal (* ***The Annot Lyle*** *at p 116). However, when a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory (* ***Wilson v Church (No 2)*** *at pp 458-459. Thus, a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting them back, if the appeal succeeds (* ***Atkins v Great Western Rly Co****).*

Relying on the above dicta, Mr Khwaja submitted that what was relevant was the financial position of the judgment creditor and not the judgment debtor. He submitted that as the judgment creditor in

the present case was financially sound and there was no danger of getting the funds back from the judgment creditor in the event the appeal was successful, the application for stay should be refused.

Mr Hwang accepted the authority of the two cases relied on by Mr Khwaja but pointed out that, in both cases, the court was referring to the difficulty in obtaining a refund of the sums paid to the judgment creditor in the event the appeal was successful only to illustrate the kind of matters that can be said to constitute special circumstances justifying a deviation from the general rule that a successful litigant is entitled to the fruits of his victory. The court, he submitted, was not, in those two cases, saying that there were no other circumstances that could qualify as special circumstances.

I agreed with that submission. The special circumstances referred to by Yong Pung How J cannot be confined only to cases where the judgment creditor may be unable to return the moneys. It is not possible to give a catalogue of all the circumstances that would qualify to be considered as special. The court, in every case, will have to examine the facts to see if special circumstances justifying the grant of a stay of execution existed. The existence of the lien in favour of the plaintiffs under which the plaintiffs could obtain some satisfaction of the judgment coupled, with the difficulties involved in obtaining specific performance against an impecunious purchaser and the difficulties attendant on reversing the purchase should the appeal be successful, were all factors that, in my view, made the circumstances of this case sufficiently special to justify an order of stay.

There was one other ground relied on by the defendants in support of their application. The defendants were not able to complete the purchase as ordered or even make any further payment towards the purchase because of their financial predicament. It was, however, open to the plaintiffs to exercise their rights under the lien and take steps to sell the property. The plaintiffs, however, chose not to do so and elected instead to demand payment of the completion interest that was accruing and, upon the failure of the defendants to make payment, proceed to take steps to wind-up the defendants. Mr Hwang submitted that the reason the plaintiffs chose this course of action was because the plaintiffs wished to have the defendants wound-up so that the appeal would be frustrated. Mr Khwaja did not dispute that the effect of the defendants in this case being wound-up would be that the appeal would be frustrated.

In **Wilson v Church** [1879] 12 Ch D 454 at 458 (cited with approval in ***Lee Sian Hee v Oh Kheng Soon*** ) Cotton LJ, in considering the question of a grant of execution pending appeal, said:

> *I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.*

A winding-up of the defendants in this case - a step being actively pursued by the plaintiffs - would effectively render the appeal in this case nugatory. That, in my view, was an additional reason why a stay of the order to complete should be granted.

For the above reasons, I granted the application for stay but ordered that the plaintiffs be at liberty to enforce orders 3 and 6 of the judgment of Lee Seiu Kin JC.

## Outcome:

Application allowed.

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